

Answers To Employer Questions In Wake Of Threatened ICE Raids

Immigration and Customs Enforcement (ICE) threatened to start to carry out a series of immigration raids this weekend seeking to identify and apprehend undocumented individuals – with some potentially occurring at the nation’s workplaces. These potential raids might continue for weeks or months, with varying levels of intensity and geographic focus. Even if they do not materialize to the extent originally promised, just the specter of these enforcement activities has raised a number of questions from employers about how to respond to such an action, and how to minimize the chances of them happening in the first place.

What If Our Business Is Visited By ICE?

ICE typically inspects employers’ premises in one of two ways: through an audit, or through a raid.

What To Do If You Face An ICE Audit

The most common way in which your business might end up interacting with enforcement officials is through an audit. The agency will initiate an audit through a Notice of Inspection, which asks you to produce certain I-9s for inspection within three days. In addition to I-9 forms for current and recently terminated employees, you will most likely be asked to turn over a list of current employees, quarterly wage and hour reports, payroll records, E-Verify confirmations (if the company uses the system), and related business information, including the business owner’s Social Security Number.

If you receive such a Notice, immediately contact your legal counsel. You may be able to receive a short extension for legitimate business reasons depending on the type of audit requested, and your counsel might be able to work with the government official to make the process of an inspection more efficient for all involved. Once the audit is underway, a typical compliance review consists of an investigator verifying that your I-9 forms have been properly completed. This typically includes a review of your documents to ensure that they are timely completed, they are correctly and entirely filled out, and that the associated documents establishing identity and employment eligibility are legitimate.

The I-9 form review process may take as little as two weeks or as long as three years. Once the review is complete, ICE will inform you of the results. The best news you can hope for would be a letter indicating that you are in full compliance. If only minor violations were found, ICE may issue you a notice of technical or procedural failure indicating certain mistakes on forms, and you will have 10 business days to correct them.

If more substantive violations were found, ICE may issue you a warning notice without assessing a monetary penalty. However, if the agency determines that you have substantive violations or knowingly hired individuals not authorized to work in the United States, it may issue you a notice of intent to fine. If this occurs, your lawyer may be able to negotiate a reduction of the fine, payment

plan, or request a hearing before a federal administrative law judge within 30 days.

ICE may also issue you a notice of suspect documents regarding an employee's authorization to work, advising you of potential penalties if you continue to employ that individual. In such a case, you will be given an opportunity to provide additional documentation to show authorization to work. Similarly, the agency may issue a notice of discrepancy indicating that work eligibility cannot be determined for a certain employee, with an opportunity for that worker to provide documentation showing employment eligibility or face termination from employment.

What To Do If You Face An ICE Raid

Alternatively, ICE may conduct an actual raid, which is significantly more disruptive. To conduct a raid, ICE first obtains a search warrant (which means the agency has demonstrated to a judicial official that it has probable cause to effectuate an unplanned visit). If ICE officials have a search warrant when they come knocking on your door, understand that they will take the position that they are entitled to immediate access to your premises and your records. There is no three-day period to gather documents, and ICE agents will not wait for your attorney to arrive before conducting a search.

If you are the target of an ICE raid, there are certain things you should keep in mind. First, stay calm and ask for a copy of the warrant. You should examine the warrant to ensure things are in order (e.g., that the warrant is signed by a judge). From there, immediately provide a copy to your attorney. Second, monitor the search to ensure the ICE agents stay within the scope of the warrant, but stay out of their way to the extent possible. You can assign a company representative to follow the agents around the premises, and record their actions, but do not interfere with their investigation or engage in any hostilities toward them.

Third, be mindful of how your actions could harm the company. You should not do anything that might constitute harboring undocumented workers, such as hiding employees, aiding in their escape from the premises, shredding documents, or providing false or misleading information. At the same time, company representatives should not give any statements to ICE agents without first speaking with legal counsel. However, be aware that you cannot instruct employees to refrain from speaking to agents if questioned, so you should let that process carry out without interference. Also, if agents want access to locked facilities, you should unlock them and cooperate as much as you can.

Fourth, you should track what and who is seized by ICE, providing your list to your legal counsel once the enforcement action has ended. Finally, you should prepare to address the media during and after a raid. Work with your legal counsel to determine the best way to accomplish this task and whether it is necessary to do so.

What If Workers Don't Show Up For Work Fearing A Raid?

It is important to keep in mind that, under certain circumstances, an employee's attempt to induce or engage in a work stoppage constitutes protected activity under the National Labor Relations Act (NLRA). Section 7 of the statute protects union and non-union workers alike who engage in lawful concerted activity for purposes of mutual aid and protection.

The NLRA generally comes into play when employees initiate action among coworkers over work-related issues or bring complaints about the workplace to management. These same protections have generally been extended to unauthorized workers, although the NLRB has traditionally stopped short of extending them a backpay remedy. Although you may have a legitimate interest in maintaining normal productivity levels under these circumstances, employees who choose not to report for duty may be deemed to be collectively refusing to work in protest of the raids, and therefore protected. Conversely, those who

confine their protests to broad-based government action bereft of any nexus to workplace concerns are generally not afforded such protection.

You should therefore train managers to engage (preferably in the presence of a witness) any workers who walk off the job without prior approval by asking where they are going or whether they are leaving their job despite being scheduled to work. If they indicate they are protesting, offer them the option of discussing their concerns with management during a work break or at the end of their shift. Although you can instruct such employees that they will not be paid for time they spend off the job, make sure your managers know not to threaten discipline for anyone engaging in such protests if they instead decide to walk out.

How Can We Prepare Today To Avoid A Raid Tomorrow?

By taking concrete steps now, you can limit your risk and do your best to avoid an invasive ICE raid altogether. Here are five steps you can take today to ensure extreme vigilance in an era of extreme vetting.

- Ensure your **I-9 compliance programs** are in place, up-to-date, and followed.
- Complete **I-9 forms** if any are lost or missing. All current employees hired after November 6, 1986, must have an I-9 form on file. Use payroll records to ensure that you have all I-9 forms required for current employees or prior employees.
- **Train staff and managers** on how to complete an I-9, and what actions they should take when they are made aware that an employee may not be authorized to work in the U.S.
- Conduct **regular internal I-9 audits** and remedy identified errors. You should have outside counsel conduct periodic I-9 audits as well.
- **Train a rapid response raid team** responsible for immediately contacting immigration counsel and employment counsel in the event of a raid. They should be trained on what to do in the event of a visit from enforcement officials, as outlined below.

Conclusion

If you have any questions about these developments or how they may affect your business, please contact any member of our Global Immigration Practice Group, our Labor Relations Practice Group, or your Fisher Phillips attorney.



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